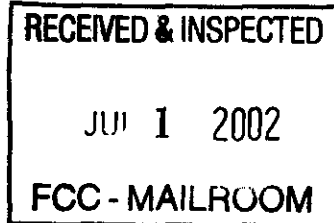


Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)	
)	
Appropriate Framework for Broadband)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities)	
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Computer III Further Remand Proceedings:)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	
Review – Review of Computer III and ONA)	
Safeguards and Requirements)	

Reply Comments of
The Nebraska Independent Companies

I. Introduction

The Nebraska Independent Companies¹ (the “Companies”) hereby submit reply comments in the above captioned proceeding. With this Notice of Proposed Rulemaking² (“NPRM”) the Federal Communications Commission (the “Commission” or “FCC”) launches a thorough examination of the appropriate legal and policy framework under the

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., Hooper Telephone Company, K&M Telephone Company, Inc., NebCom, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Pierce Telephone Co., Rock County Telephone Company, Stanton Telephone Co., Inc. and Three River Telco.

² See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers*, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, FCC 02-42 (“Wireline Broadband Access NPRM”) (rel. Feb. 15, 2002).

Communications Act of 1934, as amended, for broadband access to the Internet provided over domestic wireline facilities.

The Commission has launched several parallel notices associated with broadband services. The first investigated the appropriate regulatory classification for cable modem service.³ A declaratory ruling has been issued in that investigation,⁴ which some commenting parties have used as a basis for recommendations in this proceeding. However, as the Companies will demonstrate, the two proceedings, while related, do not deal with the same set of circumstances and thus, findings from the cable modem proceeding are not directly applicable to the docket at hand. The notice that is most closely linked to the proceeding at hand examines the dominant status of incumbent local exchange carriers (“ILECs”) when they provide broadband Internet access services.⁵ By contrast, this NPRM addresses the fundamental definitional and classification questions for wireline broadband Internet access service. Examining the record and issues in both proceedings, the Companies assert that allowing carriers to petition the FCC to have their provision of digital subscriber line (“xDSL”) service declared non-dominant would best meet the Commission’s stated goal of encouraging the ubiquitous availability of broadband to all Americans, while addressing concerns about regulatory burdens of providing xDSL service under the current regulatory scheme. Finally, the Commission

³ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCC Rcd 19287 (2000) (“*Cable Modem Notice*”).

⁴ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (“*Cable Modem Declaratory Ruling*”) (rel. Mar. 15, 2002).

⁵ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-377, Notice of Proposed Rulemaking, FCC 01-360 (“*Incumbent LEC Broadband Notice*”) (rel. Dec. 20, 2001).

has also issued a notice to examine the obligations of ILECs to make their facilities available as unbundled network elements to competitive local exchange carriers (“CLECs”) for the provision of broadband services.⁶ This notice may be used by the Commission to address concerns raised in the current proceeding regarding Section 251 unbundling obligations with respect to facilities used to provide xDSL service.

In these comments the Companies focus specifically on xDSL services offered by wireline carriers either on a wholesale basis to Internet Service Providers (“ISPs”) or on a retail basis to end users. The Companies maintain that the Commission’s decision in the *Cable Modem Declaratory Ruling* should not be used as a precedent for the regulatory treatment of xDSL service, as cable modem service does not include an offering of telecommunications services to subscribers, while the same is not true for xDSL service. The Commission should not classify xDSL service as an information service, as the regulatory uncertainty created by eliminating Title II and Section 251 obligations may serve to slow ILEC deployment of broadband services until the uncertainty is resolved. The Companies continue to recommend that the Commission should allow ILECs to petition for non-dominant status in the provision of xDSL services. Such treatment would lessen regulatory burdens, while encouraging the ubiquitous availability of broadband to all Americans, which is the Commission’s primary stated goal in this proceeding.

⁶ See *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001).

II. The Commission's Conclusion in the *Cable Modem Declaratory Ruling* Should not Dictate the Decision as to the Regulatory Treatment of xDSL Service.

Some commenting parties urge the Commission to regulate xDSL service in a manner similar to the method it has adopted for cable modem service. However, this recommendation ignores the nature of the service being offered, and is clearly inappropriate given a comparison of the two services.

Verizon commented that the Commission must treat local telephone company broadband as it treated cable modem service in the *Cable Modem Declaratory Ruling*.⁷ Verizon states that it would flatly contradict the 1996 Act to regulate broadband differently depending on the facilities or medium of transmission used, or to remove barriers to investment for some technologies but not for others.⁸

BellSouth states that the Commission should institute provider parity, not service parity, between ILECs and cable modem providers.⁹ According to BellSouth, there is simply no justification for subjecting ILECs to any set of rules more stringent than those imposed on cable modem providers and unless those regulatory burdens are lifted from ILECs, cable modem providers, as well as other broadband providers, should share the same burdens.¹⁰

⁷See Comments of Verizon, CC Docket Nos. 02-33 et al., filed May 3, 2002, at p. 23.

⁸Id. at p. 24.

⁹See Comments of BellSouth, CC Docket Nos. 02-33, 95-20, 98-10, filed May 3, 2002, at p. 13.

¹⁰Id at p. 15.

Qwest urges the Commission to reaffirm that, just like cable modem service, bundled DSL Internet access service is an “information service” with no “telecommunications service” component.¹¹

The Commission, in the *Cable Modem Declaratory Ruling*, established the framework in which the proper statutory definition to classify a service rests. The Commission cited the *Universal Service Report*, 13 FCC Rcd at 11530 para. 59 (noting “Congress’s direction that the classification of a provider should not depend on the type of facilities used...[but] rather on the nature of the service being offered to consumers.”).¹²

As part of the Commission’s decision in the *Cable Modem Declaratory Ruling*, the Commission found that cable modem service is not itself and does not include an offering of telecommunications service to subscribers. The Commission disagreed with commenters that urged it to find a telecommunications service inherent in the provision of cable modem service since the Commission found that that there is no such separate and distinct service being offered now. The Commission found that it was not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public or to such classes of users to be effectively available to the public.

The Commission cannot make a similar finding for ILEC providers of xDSL service. Telecommunications providers by definition are providers of telecommunications services. The provision of xDSL service does not change this fact.

¹¹ See Comments of Qwest Communications Int’l Inc., CC Docket Nos. 02-33, 95-20, 98-10, filed May 3, 2002, at p. 1.

¹² See *Cable Modem Declaratory Ruling* at para. 35.

The deployment of modems installed at the customer premise and the carrier's central office to derive additional bandwidth from the existing copper loop does not change the nature of services being offered to the public or the ILEC's classification from a telecommunications provider providing telecommunication services to an information service provider providing information service. ILECs will still be engaged in the provision of telephone exchange service and exchange access, telecommunications services for which providers of cable modem service have not engaged. It is therefore reasonable to expect different classifications based upon whether telecommunications services are or are not being provided to the public.

III. Classification of ILEC xDSL Service as an Information Service will Create Uncertainty as to ILEC Title II and Section 251 Obligations and as a Result, May Slow ILEC Deployment of that Service Until Uncertainty is Resolved.

One of the principles and policy goals guiding the Commission in this proceeding is that "broadband services should exist in a minimal regulatory environment that *promotes investment* and innovation. . . ." ¹³ The Commission further states "[t]herefore, our policy and regulatory framework will work to foster investment and innovation in these networks by *limiting regulatory uncertainty*. . . ." ¹⁴ A review of the comments indicates that commenting parties hold widely differing views as to the regulatory status and obligations of ILECs with regard to the underlying facilities used to provide xDSL service under the regulatory framework for xDSL services proposed by the Commission. This divergence of views suggests that regulatory uncertainty under the Commission's proposed regulatory framework would increase rather than decrease, as protracted

¹³ *Wireless Broadband Access NPRM* at para. 5 (emphasis added).

¹⁴ *Ibid.* (emphasis added)

litigation is likely to result. As such, the classification of ILEC xDSL service as an information service is likely to hinder deployment of xDSL service and investment generally, rather than promoting it.

Several commenting parties, including Verizon, Sprint, Allegiance Telecom, and NARUC, note that if the Commission were to classify wireline broadband facilities and services under Title I, most regulations would no longer apply. On the wholesale side, the unbundling, collocation, and other obligations of Section 251 would cease to apply to facilities and services provided over broadband facilities offered in a non-common carrier manner, since Title II as a whole applies to common carrier services and the express terms of Section 251 make it clear that its mandate applies only to common-carrier offerings.

Using a bandwidth-based definition to describe a category of services that is not subject to Title II regulation could lead to any number of results that are inconsistent with the pro-competitive goals and requirements of the 1996 Act.¹⁵

AT&T believes however, that a competitive LEC may obtain a network element and use it to provide any telecommunications service, including standalone broadband transmission, regardless of how the ILEC uses that element.¹⁶

According to NARUC, the FCC's new definition of "information services" will significantly enhance the prospect for protracted litigation over authority questions at both the State and federal level. Introducing a new and wholly unknown scheme of

¹⁵ See Comments of Verizon, at p. 30; Comments of Allegiance Telecom, Inc. CC Docket No. 02-33, filed May 3, 2002, at p. 29; Comments of Sprint Corporation, CC Docket Nos. 02-33, 95-20, 98-10, filed May 3, 2002, at p.4; Initial Comments of the National Association of Regulatory Utility Commissioners, CC Docket Nos. 02-33, 95-20, 98-10, filed May 3, 2002, at p. 5.

¹⁶ See Comments of AT&T Corp, CC Docket Nos. 02-33, 95-20, 98-10, filed May 3, 2002, at p. 30.

regulation into the market at this point injects a qualitatively different level of uncertainty, and that itself is damaging. Further, NARUC believes that existing FCC and State precedents provide no useful basis to make predictions on how either the FCC or States might proceed under the *Notice's* novel interpretation of the FCC's Title I authority.¹⁷ The Companies agree with NARUC's assessment and the Companies believe that any uncertainty on the ultimate regulatory status will encourage companies to delay their investment in broadband deployment until a final resolution is known.

IV. xDSL Service is a Telecommunications Service for which the Commission Should Allow ILECs to Petition for Non-dominant Status and in Granting such, the Commission will Encourage the Ubiquitous Availability of Broadband to all Americans.

As the Companies suggested in their comments filed in this docket on May 3, 2002, the more appropriate treatment of xDSL services is as a non-dominant telecommunications service. In regulating xDSL service in this manner, the Commission would retain regulatory oversight and reduce the regulatory uncertainty associated with deregulation. Rural carriers could deploy xDSL service to their subscribers at rates that are affordable and ILEC requests for less onerous requirements for rate makings and tariff terms would be addressed.

The adoption of non-dominant status for xDSL service addresses the concerns of multiple interests in this docket including the RBOCs, rural ILECs, CLECs, ISPs, state Commissions, and consumers.

First, and of most importance to the rural customers served by the Companies, a non-dominant status will ensure that rates for xDSL service in rural, high-cost areas will

¹⁷ See NARUC Comments at p. 9.

be kept at levels that are affordable while recovering the overall cost of the network required to provide those services. As the Companies pointed out in their Comments filed in this proceeding, a Title I regulatory classification for xDSL would cause an allocation of joint and common cost associated with the loop from a regulated classification to a non-regulated classification. A portion of the joint and common cost that is now recovered through universal service support mechanisms would shift to the non-regulated xDSL service and would have to be recovered through a substantial increase in price of xDSL service to the rural, high cost consumer. Such an increase in price would make xDSL service unaffordable in most rural areas and would effectively curtail any broadband access deployment in rural, high-cost areas. Such a result would not only be contrary to the Commission's primary policy goal in this proceeding, to encourage the ubiquitous availability of broadband to all Americans, but it would ensure a digital divide between urban and rural, high-cost areas of the country.

Second, a non-dominant status for xDSL and broadband access service will allow wireline carriers the flexibility to experiment with different and innovative pricing schemes in which to stimulate demand and compete against providers of cable modem service. It will also reduce the regulatory requirements associated with providing cost support documentation for xDSL service.

Third, adoption of Title II, non-dominant regulatory status for xDSL service will assure that there is no question that Section 251 obligations still apply regardless of whether xDSL is offered as a separate service offering or bundled with an ILEC ISP service. This approach will minimize the risk of protracted litigation that may result from the adoption of a Title I regulatory classification that would be inconsistent with the pro-

competitive, market-opening provisions of the Act. Some commenters have suggested that some of the unbundling requirements are an impediment to deploying broadband facilities and by the Commission's adoption of a Title I classification for broadband, such unbundling requirements would cease to apply. To the extent that the Commission's UNE requirements, such as remote terminal collocation and line sharing, add excessive costs to the ILECs' provision of xDSL service, the Commission should review and modify such requirements within the context of Docket No. 01-338, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*.

Fourth, a Title II non-dominant status will ensure that ISPs will have access to xDSL service as a stand-alone service offering. As the Companies discussed in their comments, a regulatory framework that defines xDSL service as a Title I information service will limit a consumer's choice for broadband Internet access to the provider that has deployed the underlying transmission facilities. Although Qwest comments that ILECs lack the incentive to deny their own end user access to ISPs,¹⁸ there are no assurances that ILECs ultimately will not deny access.

V. Conclusion

In order to encourage the ubiquitous availability of broadband to all Americans, the Commission must not adopt a Title I regulatory scheme that is beneficial to some yet devastating to others. As the Companies have addressed, adopting a Title II, non-dominant regulatory status for xDSL is beneficial to all interests and will thus encourage the availability of broadband to all Americans.

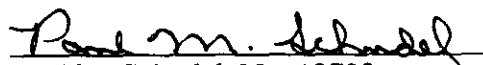
Dated: June 28, 2002.

¹⁸ See Qwest Comments at p. 27.

Respectfully submitted,

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